

EIP

The Online Safety Bill*

***The Online Safety Act became law on 27 October 2023. Please see our article about the new law below.**

Following a long gestation, the Online Safety Bill (OSB) has been published with the intention that it come into effect later this month. It is a bill which the UK Government says “will make the UK the safest place in the world to be online”. It aims to do so by introducing safety and free speech duties on certain internet service providers which are regulated by OFCOM.

This article aims to update the reader on the scope of the OSB and give a brief introduction of the new duties to which the service provider intermediaries will need to adhere lest they suffer the legal consequences of failing to do so.

Jurisdiction

The OSB aims primarily to be domestic legislation, seeking to make the internet safe for “UK Users”. Nevertheless, it will have extra-territorial reach as all that is required for the OSB to apply to an intermediary is for it to have a “link” with the UK [1]; “link” in this context, is defined very broadly [2].

General structure of the OSB

The duties in the OSB are intended to operate essentially at the systems level rather than at an individual content level. They are designed to make the internet safer by requiring online intermediaries to prevent their services from being used for “illegal content”, as defined under the OSB, but also to safeguard free speech and privacy rights.

The duties are designed to be “duties of care” which are enforceable by OFCOM; a breach

of these duties can lead to a penalty up to £18m or 10% of global turnover (whichever is higher) and the risk of a service cessation order. The duties are also on a sliding scale, which mean that all providers will have general duties, but there will be additional duties for services 'likely to be accessed by children' and on high risk/high reach service providers. [3]

Duties are preoccupied with three core categories of harmful content:

- Illegal content- content the creation/dissemination/accessing of which results in the commission of criminal offences;
- Fraudulent advertising by certain providers (called "Category 1" and "Category 2A") to be defined by subsequent regulation and;
- Content that is lawful but nonetheless harmful to children.

HTC content is a particularly troublesome area to regulate as it can be lawful under the OSB for a publisher to publish it, but illegal for an intermediary to allow others to access it.

Key themes of the safety duties

The safety duties set out in the OSB that are placed on online intermediaries are about 300 pages long, but can be summarised into four main themes, of which two are key:

Risk assessment – this includes assessment of the following:

- The proportionate risk to the user base;
- The level of risk of access to illegal (where relevant) HTC content;
- The risk that service facilitates access;
- The overall risk of harm.

Active safeguarding:

- Proportionate measures must be in place to prevent access to harmful content, to manage the risks and to minimise it.
- Protecting children against the risk of harm arising out of features of the service.
- Once alerted, to swiftly take down any illegal content.

One way online intermediaries can ensure compliance with their safety duties is to follow the codes of practice that is expected to be published by OFCOM following the commencement of the bill; whether this is the only way to comply will be subject to future case law.

Reception

Reception of the Online Safety Bill has been mixed. Some groups have welcomed the Bill, such as Which?, and children's charities such as the National Society for the Prevention of Cruelty to Children. [4]

However, there are many criticisms of the Bill. There are also doubts as to whether the Bill will be effective in regulating online safety and whether OFCOM will be overburdened with these additional regulatory duties.

Critics argue that the Bill may substantially infringe on democracy as it empowers OFCOM with sweeping powers to regulate the internet, including the power to issue notices to force companies to scan private messages for illegal material, with little democratic scrutiny by Parliament and no consultation.

Another concern is that the safety duties are too ill-defined and potentially onerous: the Bill also heavily incentivises online intermediaries to block content to avoid a robust sanctions regime, which includes significant fines.

Conclusion

The OSB seeks to improve online safety in the UK by introducing safety duties and free speech duties with which online intermediaries are obliged to comply and which are enforceable by OFCOM. The two key themes require service providers to have in place a proportionate risk assessment and proportionate active safeguarding.

Online intermediaries should consider taking steps to prepare for its implementation, such as conducting a risk assessment to see if their services are in scope; considering amending products and policies once the risk assessment has taken place to fit in line with the OSB; and monitoring that status of the OSB and OFCOM publication, particularly the codes of practice as that would ensure compliance with the law.

[1] OSB Art 4 [2]

[2] OSB Art 4(5) – There is a “link” if there is a “significant number of UK users” or if UK is one of the “target markets” for the service

[3] Art. 96(10)

[4] [U.K. Passes Online Safety Bill Restricting Social Media Content \(forbes.com\)](https://www.forbes.com)